Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

KIMBERLY RENDISH,

Petitioner,

v.

CITY OF TACOMA; RAY C. CORPUS, City Manager for the City Manager for the City of Tacoma, in his individual capacity; ROBIN JENKINSON, City Attorney for the City of Tacoma, in her individual capacity; JOHN KOUKLIS, Chief Assistant City Attorney for the City of Tacoma, in his individual capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

Paul Lindenmuth*
LAW OFFICE OF NEIL J. HOFF
252 Broadway
Tacoma, Washington 98402
(253) 383-3434

Counsel for Petitioner

*Counsel of Record

aBCD Legal Printers, Seattle, Washington

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QUESTIONS PRESENTED

Whether the Supreme Court will examine and resolve the conflict among the circuit courts as to the scope and breadth of constitutional protections so public employees have access to the courts?

Whether curtailment of the right of access to the courts for public employees implicates not only a first amendment right, but several other rights protected in our Constitution and Bill of Rights?

Whether a public employee can be fired for filing a lawsuit against her employer on grounds of disruption when her lawsuit has public concern elements (as recognized by the Ninth Circuit opinion herein) which, by content, involve matters of extreme importance and of inherent public concern?

Whether a preliminary injunction should have been issued reinstating petitioner to her employment as an assistant city attorney when the undisputed facts show that she was terminated from her job for filing a lawsuit which, by content, raised issues of inherent public concern and it is clear that the petitioner would prevail on the merits of the legal questions invoked as protected status of her "speech"?

Whether a loss of the fundamental constitutional right to have access to the courts is sufficient to establish the irreparable harm necessary to justifying the issuance of a preliminary injunction reinstating a public employee to her former job when, given proper analysis, there is an extremely strong likelihood of success on the merits?

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STATEMENT OF JURISDICTION

The decision of the United States District Court of Appeals for the Ninth Circuit was initially filed on August 20, 1997. *Rendish v. City of Tacoma,*, 123 F.3d 1216 (9th Cir. 1997) (Appendix A). A timely motion for rehearing and suggestion for rehearing en banc was brought. On January 16, 1998, with a published dissent, the petition for rehearing was denied and the suggestion for rehearing en banc was rejected. *Rendish v. City of Tacoma*, ___ F.3d ___ (9th Cir. 1998) (Appendix B).

Jurisdiction is conferred on this court by 28 USC § 1254(1) and 28 USC § 2101(c). This petition is timely under the terms of Supreme Court Rule 13(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fundamental constitutional right to have access to the courts. Such a concept has been primarily analyzed under the First Amendment right to petition clause. It also has been analyzed as implicating the privileges and immunities clause of Article 4 of the constitution and the due process clauses of the Fifth and Fourteenth Amendment to the United States'

Constitution. 42 USC § 1983 is the statutory vehicle under which suit has been brought. The pertinent text of those provisions are set forth in Appendix C.

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STATEMENT OF THE CASE

Plaintiff was employed as an Assistant City Attorney by the City of Tacoma City Attorney's Office since 1990. On May 13, 1996, she filed a verified complaint for damages with the State of Washington, Pierce County Superior Court under cause number 96-2-08191-0. In her complaint, she named the City of Tacoma and as her claim involved a claim pursuant to 42 USC § 1983, she was compelled to name individual respondents inclusive of her current and former supervisors and Tacoma Municipal Court Judge Ralph Turco who allegedly were involved in the unlawful adverse employment decisions taken against her.

Within her complaint filed in state court, appellant alleged she was denied a raise, suspended, harassed, and denied promotion for opposing discriminatory practices unlawful under RCW 49.60 - Washington's Law Against Discrimination. Her complaint alleged that the adverse employment actions were inter alia unlawfully retaliatory in violation of RCW 49.60.210, the public policy of the

State of Washington and her first amendment rights.

On August 8, 1996, the appellant filed an amended complaint and sent the amended complaint for service. With the amended complaint served on current City Attorney Robin Jenkinson, a cover letter was attached seeking negotiation prior to engaging in litigation on the allegations made in the amended complaint. (DN 9). The cover letter made modest demands.

Over the weekend of August 11, 1996, service on the respondents in the State Court case was attempted or completed. On Monday, August 13, 1996, towards the end of the day, petitioner was approached by her supervisors who handed her a letter suspending her with pay. (DN 9). The letter unapologetically pointed to the filing of the state court lawsuit as the sole reason for the suspension. (Id).

Petitioner's counsel swiftly responded to this provocative action by serving a letter on defense counsel advising that the suspension was violative of petitioner's rights to have access to the courts and demanded the suspension be immediately rescinded. (DN 9, Attachment No. 2).

On August 17, 1996, Ms. Rendish received a letter terminating her employment. Again the letter cited as the

sole reason for the adverse employment action was the fact that petitioner had filed a lawsuit. (DN 10).

On August 21, 1996, petitioner filed, in the United States District Court, a complaint for damages and injunctive relief. (DN 1) In her complaint, petitioner alleged her suspension and termination for filing a lawsuit were violative of her First Amendment right to have access to the Courts. Id.

On September 14, 1996, petitioner filed a motion for issuance of a preliminary injunction, with supporting materials, outlining the above fact pattern. (DN 7-10) In supporting her motion, petitioner filed an affidavit explaining that the underlying controversy had existed for a number of years and, in part, rebutted the reasons given in her notice for termination. (DN 10) In particular, she explained that even though she had filed a claim for damages with the City as early as 1994, it was only when such a claim was transformed to a lawsuit that swift retaliatory adverse action was taken. Id. She further explained that even when she was in a previous adversarial posture with her employer in 1994 representing herself pro se and cross-examining her employer over three days before an administrative law judge - there was never an indication that such a posture would undermine her ability to perform

her job duties. Id. Finally, she explained that her job had unique features and her substantial concern that her termination would "chill" other employees from filing employment related lawsuits. Id.

On September 16, 1996, respondents' filed extensive opposition materials. (DN 14-17, 30) Generally, they tried to justify their actions underlying the state court case and then ultimately the termination decision. Id.

Specifically with regard to the termination decision, City Attorney Robin Jenkinson opined the termination was justified because she was not in agreement with the allegations in petitioner's state court complaint and provided conclusory allegations that she no longer had "trust and confidence" in petitioner because she filed a lawsuit and that because of the lawsuit, Jenkinson speculated that petitioner no longer would follow supervisory directions. (DN 17) Jenkinson also expressed her concerns that because a municipal court judge had been named as a defendant in the state court case, this could undermine relationships between the bench and the City Attorney's office. Id.

On September 19, 1996, petitioner filed extensive reply materials. (DN 23, 31). She provided rebuttal of

some of the allegations made by the respondents and explained the reason why the municipal court judge had been named as a defendant in the underlying lawsuit was because of an event (witnessed and testified to by another judge) where the defendant judge demanded petitioner be disbarred for speaking to the media about him and the way he handled domestic violence cases. It was shortly thereafter that her treatment by her employers started to go downhill. Id.

On October 10, 1996, the Honorable Franklin Burgess issued an order denying petitioner's motion for a preliminary injunction. (DN 32) In the district court's analysis it was recognized that it was less than clear as to whether a retaliation for litigation claim had the same elements as a public employment free speech claim. However, for the sake of analysis, the "likelihood of success on the merits" prong of the test for issuance of a preliminary injunction, the district court determined, "[t]he better practice is probably to analyze whether there is a public interest element to the litigation and then to analyze whether there is sufficient disruption of the office to justify termination in view of the pending lawsuit." (DN 34, p. 4)

Despite recognition that prior to filing her lawsuit, there was "no showing that she was going to be fired for

poor performance" the district court apparently misconstrued the legal and factual implications of petitioner's state court complaint by, in part, assuming that because the adverse employment actions were "personnel matter(s)" they were unprotected even if the reasons for such actions were in retaliation for protected speech or conduct. (DN 32, p. 5) The district court also concluded inter alia that petitioner's support of a judicial candidate did "not rise to a matter of public concern". (DN 32, p. 6) Ultimately, the district court found that "[t]he showing on likelihood of success is not strong". (Id., p. 7)

On the irreparable harm prong, the district court ignored the non-tangible aspects of petitioner's losses and concluded that since the harm (loss of a job) was economic, she was unable to establish sufficient irreparable harm.

On October 21, 1996, reconsideration was sought. (DN 33, 34, 35) Without requiring a response, the district court, on October 28, 1996, issued an order denying reconsideration. The district court observed "[t]he issue of irreparable harm is the fatal element for plaintiff, even giving the likelihood of success element a more favorable view." (DN 38, p. 2)

Petitioner thereafter filed an interlocutory appeal pursuant to 28 USC § 1292(a)(1). On August 20, 1997, a

panel of the Ninth Circuit issued the published opinion set forth at Appendix A. Noting a number of errors, petitioner sought rehearing and suggested rehearing en banc.[1]

In January 16, 1998, the Ninth Circuit denied rehearing and rejected the suggestion for rehearing en banc. However, in a published dissent from such denials, Judge Reinhardt joined by Judge Tashima wrote a scalding opinion condemning the panel's opinion. This dissent is set forth at Appendix B.

REASON FOR GRANTING THE WRIT

A. Introduction

The result of the Ninth Circuit herein is "hardly consistent with the fundamental principles of orderly protest which our Constitution sought to preserve by protecting our right [to] petition the government for redress." *Anderson v. Davila*, 125 F.3d 148, 163 (3rd Cir. 1997). Or as put in Judge Reinhardt's dissent from the failure to rehear this case en banc:

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[1]During the pendency of the interlocutory appeal the case continued through discovery. A day prior to the issuance of the first Ninth Circuit opinion, respondents moved for summary judgment. On October 28, 1997, and after the initial opinion issued, the district court denied summary judgment. Currently, the case has been subjected by the district court to a stay order.

> The panel's holding that a public employee (an assistant city attorney) may be fired from her job for filing a good faith lawsuit against her employer - a law suit that concededly raises important issues of public concern - mocks the very purpose of the First Amendment's Petition Clause and debases our commitment to the legal system. It will certainly come as a surprise to those who have taken seriously our assertions that persons with legitimate grievances should settle their disputes by peaceful means in the courts rather than through disruptive or militant extra-legal actions. (Appendix B, p. 1).

It is respectfully submitted that what is at issue herein involves a question fundamental to our constitutional system of government and where there is a pressing need for the Supreme Court to conclusively resolve the issues. A pressing need that is further compounded by a severe split among the Circuit Courts as to the nature and extent of the protection that shall be afforded public employees who exercise what has been characterized as the fundamental right to have access to the courts to bring lawsuits against their government employers. Unfortunately, the current state of affairs is that the breadth of protection afforded for such a fundamental right is dependant on the caprice of the geographic location of where the alleged constitutional violation occurred. It is submitted that simply should not be.

The instant case clearly implicates Supreme Court Rules 10(a) and 10(c) and for the reasons discussed below, a writ should be granted.

B. The Fundamental Right To Have Access To The Courts.

The cases of the Supreme Court and Circuit Courts indicate that the right to have access to the courts is a fundamental right protected by our constitution. However, the actual textual source of such a right has been less than clear and would appear that the sources of such a right are multiple and permeate constitutional jurisprudence.

As observed in *Ryland v. Shapiro,* 708 F.2d 957, 971 (5th Cir. 1983), the Supreme Court previously has found a basis for such a right in a number of constitutional provisions:

> The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution. In *Chambers v. Baltimore & Ohio Railroad,* 207 U.S. 142, 28 S.Ct. 34. 52 L.Ed.2d 143 (1907), the Supreme Court characterized this right to access in the following terms:
>
> > The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and

> most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

207 U.S. at 148, 28 S.Ct. At 35 (citations omitted). It is clear that the Court viewed the right of access to the courts as one of the privileges and immunities accorded citizens under article 4 of the Constitution and the fourteenth amendment.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Supreme Court found in the first amendment a second constitutional basis for this right of access: "Certainly the right to petition extends to all departments of Government. The right of access to the courts is indeed but one aspect of the right to petition." *Id.* 92 S.Ct. at 612. (Emphasis added).

See also Harrison v. Springdale Water and Sewer Comm'n., 780 F.3d 1422, 1427 n.1, (8th Cir. 1986).

Even prisoners have the right to have access to the courts which provides protection regardless of the content of the issues they desire to raise in a lawsuit. *See, e.g. Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). Generally such a right encompasses the right to file a

lawsuit and not merely a winning lawsuit. *Alexander v. Macaubrie*, 982 F.2d 307 (8th Cir. 1992). However, such a right does not sanction the filing of frivolous, baseless, or sham lawsuits. *See Bill Johnson's Restaurants, Inc. V. NLRB*, 461 U.S. 731, 743, 103 S.Ct. 2161, 2170, 76 L.Ed.2d 227 (1983); *San Fillipo v. Bongiovanni*, 30 F.3d 424, 436 (3rd Cir. 1994).

Unfortunately, for the public (including public employees and employers alike) beyond the floor of frivolity it is uncertain in the public employment context when the protections afforded by our constitution attach.

C. The Split In Circuit Authority

Currently, the Seventh and (now) the Ninth Circuit require that, by content, a public employee's lawsuit must contain an issue of "public concern" prior to the attachment of protection. *Rendish v. City of Tacoma,* 123 F.3d 1216, 1221(9th Cir. 1997); *Zorzi v. County of Putnam*, 30 F.3d 885, 895 (7th Cir. 1988); *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 1412, 1420 (7th Cir. 1988). On the other end of the spectrum the Third Circuit has provided independent vitality to the first amendment petition clause and has expressly declined to apply a "public concern" element to public employees right to file a lawsuit. *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir.

1994); *Beirgu v. Reno*, 59 F.3d 1445 (3rd Cir. 1995); *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997).

The Ninth Circuit's majority opinion herein alludes that the positions of the Third Circuit is an aberrational minority view. *Rendish v. City of Tacoma*, 123 F.3d at 1222. However, a review of the authority relied upon for such a proposition would indicate that this is an area where characterization of one view as a minority and another as a majority view is somewhat equivocal. Beyond the Ninth, Seventh, and Third Circuits, it would appear that in recent times only the Sixth Circuit has squarely addressed the issue. See *Valot v. Southeast Local Sch. Dist. Bd. Of Ed.*, 108 F.3d 1220 (6th Cir. 1997). In that case three separate opinions were generated that cover the full landscape of the controversy at hand. In *Valot*, one judge followed the Seventh Circuits' approach. Another advocated for the Third Circuit's approach with a third voting for affirmance on a separate ground.[2]

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[2]The Ninth Circuit for example cited to the case of *Grabow v. Independent Sch. Dist.*, 86 F.3d 1166 (10th Cir. 1996) to support the proposition that a public concern element attaches to an access to the court's claim. However, *Grabow* had very little to do with access to the courts and is in conflict with the Ninth Circuit's own opinion herein which held discrimination complaints do constitute protected speech. Other circuits have held discrimination complaints are protected by the first

It is submitted that the Third Circuit's analysis is simply a sounder approach from the perspectives of both public policy and jurisprudential analysis. As explained in *San Filippo v. Bongionvanni*, 30 F.3d at 439, particularly in the context of filing a lawsuit, "the petition clause protects values additional to those protected by the speech clause." See also *Shea, San Filippo v. Bongionvanni: The Public Concern Criteria and the Scope of The Modern Petition Right*, 48 Van.L. Rev. 1697 (1995). Such an approach is also consistent with other circuit court decisions that have recognized, in given contexts, public employees can be afforded first amendment type protections without necessarily meeting a public concern threshold. For example, it has been recognized that filing a grievance under a collective bargaining agreement is protected regardless of content because it concerns not only speech rights but implicates associational rights. See *Stillmaker v. DePetrillo*, 710 F.Supp. 891 (D.Conn. 1989); *Boddie v. City of Columbus*, 989 F.2d 745, 747 (5th Cir. 1993). Another example

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amendment. See *Tindale v. Montgomery County Comm'n*, 32 F.3d 1535, 1540 (11th Cir. 1994); *Azzaro v. County of Allegheny*, 110 F.3d 968 (3d Cir. 1997) (*en banc*). It is respectfully suggested that this is an area of the law fraught not only with inconsistency among the circuit but internal analytical inconsistency.

would be the right to political affiliation. *Caughlin v. Lee*, 946 F.2d 1152, 1158 (5th Cir. 1991).[3]

It is respectfully submitted given that, as previously mentioned, the fundamental right to access to the court has multiple constitutional sources, there can be no more of a compelling context for recognition that rights and values are implicated well beyond free speech rights. Neither the Ninth Circuit nor the Seventh Circuit, beyond ipsa dixit, has provided a sound basis for not recognizing that such additional values warrant additional protection.

Further, it is noted that, given the context, the justifications that exist for regulation of speech in the public workplace become far more attenuated once a

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[3]It would appear that a reasonable distinction can be make between the filing of a grievance pursuant to an internal grievance mechanism and pursuant to a collective bargaining agreement. When an internal grievance mechanism is being invoked, generally, additional values are not implicated and the issue is really nothing more than a speech claim regardless of the fact that speech might be labeled a "petition". See, e.g. *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985). *Day v. South Park Independent Sch. Dist.*, 786 F.2d 696 (5th Cir. 1985). However, when a CBA is being invoked, free union association values are also implicated. See *Stellmaker v. DePetrillo*, supra. Curiously, the Ninth Circuit touched on the distinction but did not fully explore it. See *Rendish v. City of Tacoma*, 123 F.3d at 1223 n.3. It is suggested that it would make no sense to afford a lawsuit less protection than a union grievance.

lawsuit has been filed. In such a context, the public employer can use the very court system that has been invoked to ensure itself that it is not a victim of sham litigation or undue disruption. It is suggested that filing a lawsuit which removes a dispute from the workplace is inherently less disruptive. It would seem that it would be an affront to our ordered liberties to afford a public employer the power to punish someone by adverse employment actions in order to bolster denials in a yet to be adjudicated lawsuit.

D. Petitioner's Lawsuit Involved a Matter of Inherent Public Concern That Necessarily Outweighed Any Legitimate Governmental Interest That Could Warrant Adverse Actions.

Petitioner does not quarrel with the Ninth Circuit's majority determination that if "a public concern" element applies to an access to the courts claim, her underlying lawsuit can easily meet such a determination. *Rendish v. City of Tacoma*, 123 F.3d at 1224. However, as rather bluntly pointed out in Judge Reinhardt's dissent, from that point of analysis the Circuit opinion, at issue herein, literally stands the precedent of this court and other circuits on its head when it is opined that the seriousness of petitioner' speech is a justification for suppression and no

a mandate for protections. *Id.* 123 F.3d at 1225. As a result (according to Judge Reinhardt), the Ninth Circuit "creat[ed] an unprecedented rule of law that would allow city officials, in effect, to benefit from their unlawful and discriminatory behavior; the more outrageous their actions, and the more divisive the results, the greater their freedom to fire honest civic minded employees and the greater the immunity from retaliatory discharge claims they will enjoy for the unlawful actions." (Emphasis original).

The question of whether "speech" is worthy of first amendment protection generally involves an issue of law. *Connick v. Meyer*, 461 U.S. 138, 148 n. 7 (1983). In determining that issue, a balance must be struck between the employer and employee's interest. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Prior to the opinion at issue herein, the Ninth Circuit had treated such an inquiry as a true balancing test determined by the relative value of the speech versus the legitimacy of the employer's interest. See, e.g. *Voight v. Savell*, 70 F.3d 1552 (9th Cir. 1995); *Hyland v. Wonder*, 972 F.2d 1129, 1139-40 (9th Cir. 1992); *Roth v. Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1988).

In making such an appraisal, the Ninth Circuit previously had recognized that some public employee

speech by content necessarily involves matters worthy of the highest first amendment protection and constitutes speech on matters of "inherent" public concern. *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1223 (9th Cir. 1996). The Ninth Circuit had also recognized that a showing of actual disruption to a government enterprise in and of itself may not outweigh an employee's right to speak. *Johnson v. Multnomah County*, 48 F.3d 420, (9th Cir. 1995).[4]

Yet, as pointed out by Judge Reinhardt's dissent herein, the majority bluntly ignored its own precedent and failed to assign anything but de minimis value to petitioner's "speech" while fully crediting the respondent

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[4]The majority of the Ninth Circuit simply ignored in appraising the legitimacy of the government's interest, the fact that since the underlying lawsuit raised an issue of retaliation for opposition to discriminatory practices, Ms. Rendish's termination was violative of the state's anti-discrimination law - RCW 49.60, et. seq. See, e.g. *Allison v. Housing Authority*, 118 Wn.2d 79, 821 P.2d 34 (1992); *Selberg v. United Pacific Ins.*, 45 Wn.App. 469, 472-73, 720 P.2d 468 (1986). Had the underlying matter been initially filed in federal court there is little doubt petitioner would have been protected by 42 USC § 1985(2). See *Portman v. County of Santa Ana*, 995 F.2d 898, 908-09 (9th Cir. 1993). Because the discrimination at issue was not covered by Title VII, Ms. Rendish would not fall under the umbrella of protection afforded by 42 USC § 2000e-3. See *Learned v. Cit of Bellevue*, 860 F.2d 928 (9th Cir. 1988).

conclusory speculation of potential disruption. Such an approach could have disturbing consequences to the ability of the public to know and understand the inter-workings and possible failings of its government.

Under *Connick*, in making such an appraisal of protected status:

> [i]t must be determined by the content, form, and context of a given statement as revealed by the whole record.

As adroitly pointed out by Judge Reinhardt, the majority opinion herein wholly ignores that the filing of a lawsuit is a special "manner" of speech that is worthy of high protection regardless of any potential for disruption. Other circuits have recognized the context in which "speech" may arise can dictate the level of protection. See *Johnson v. Harris County Flood Central Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989); *Pro v. Donatucci*, 81 F.3d 1283, 1290-91 (3rd Cir. 1996).

As noted by Judge Reinhardt's citing to *Zorzi v. County of Putnam*, 30 F.3d at 898, even the restrictive Seventh Circuit probably would not have sanctioned the termination for filing a lawsuit that occurred in this case.

In sum, even if the matter is treated as a pure free speech case, the Ninth Circuit's holding is erroneously at

odds with this court's precedent, its own precedent and that of other circuits. The very existence of the opinion herein places at risk the public's right to know even indirectly what the government is doing and has the potential of creating a ripple that will cripple a public employee's right to file a good faith lawsuit which concededly, by content, involves a matter of public concern.

E. On Remand, the District Court Should Be Directed to Issue an Order Immediately Reinstating Petition to Her Employment.

The Ninth Circuit's evaluation of whether the district court erred in refusing to issue a preliminary injunction was predicated on the erroneous view that petitioner was unlikely to succeed on the merits. *Rendish v. City of Tacoma,* 123 F.3d at 1226. As shown above, such a proposition was predicated on the above discussed errors of law and analysis.

Other circuits have recognized that for the purposes of meeting preliminary injunction standards, irreparable harm can emanate from a determination that a party is being penalized for exercising first amendment rights. *Romero Feliciano v. Torres Gaztambide*, 836 F.2d 1, 4 (1st Cir.

1987); *Mariani Giron v. Acevedo Ruiz*, 834 F.2d 238, 239 (1st Cir. 1987); see also *Anderson v. Davila*, supra.

On proper analysis and on the undisputed facts, it is respectfully suggested that the respondents' have impermissibly inflicted constitutional injury by penalizing petitioner for exercising her fundamental right to have access to the courts. At a minimum, this matter should be remanded in order to access the feasibility of issuance of a preliminary injunction reinstating petitioner to her employment. See *Anderson v. Davila*, supra.

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CONCLUSION

The Ninth Circuit opinion herein permits an assault on our system of ordered liberties which allows those with grievances to seek vindication, compensation, and protection from our court system. In one fashion or other, our Bill of Rights, in at least six places, preserves and protects rights related to judicial proceedings. Whether purely a matter of first amendment petitioning or as an amalgamation of rights, the right to have access in the courts is fundamental and must be protected from untoward invasion. The Ninth Circuit opinion herein and the existence of a split among the circuit courts is directly and indirectly an affront to a cornerstone of our

democracy.

While this is a public employment matter, the justifications that exist for limitations on rights in the public employment, free speech context do not exist once a lawsuit has been filed. It should be for the courts and not the public employer to determine whether the filing of a lawsuit is worthy of sanction.

Petitioner was a victim and should have been recognized as such. While Judge Reinhardt's hue and cry of alarm may be dramatic, it is respectfully submitted that it is simply on the mark.

It is humbly and respectfully prayed that a writ of certiorari be issued and after full and fair consideration, the Ninth Circuit and district court be reversed and the matter remanded with direction that an injunction be issued placing petitioner back into a job she should not have lost

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in a country that is ruled by laws and not men and allows for the orderly fundamental right to have access to our courts.

Respectfully submitted,

LAW OFFICE OF NEIL J. HOFF
Counsel for Petitioner
Paul Lindenmuth*
252 Broadway
Tacoma, Washington 98402
(253) 383-3434

*Counsel of Record

APPENDIX A

Opinion by Judge Trott

SUMMARY

Individual Rights/Constitutional Rights

The court of appeals affirmed a judgment of the district court. The court a City Attorney's anti-discrimination suit against her employer was not entitled to First Amendment protection. (sic).

Appellant Kimberly Rendish filed an action in state court against appellee City of Tacoma, alleging that City officials denied her a pay raise, suspended her, subjected her to disparate discipline and scrutiny, and denied her a promotion. Rendish claimed that: (1) the City took these actions in retaliation for her speaking out against the City's unlawful discriminatory actions and that the City violated her freedom of speech; (2) appellee Judge Turco demanded that she be fired or disbarred because she had spoken to a reporter about the judge's allegedly inappropriate remarks; (3) she supported the unsuccessful efforts of a disabled candidate to obtain employment with the City; (4) she spoke out about the allegedly improper disposition of criminal cases for city employees; and (5) she supported a challenger to a sitting municipal court judge.

Five days after she served her state-court complaint, Rendish was suspended with pay. Three days after she was suspended, the City terminated Rendish's employment.

Rendish filed a 42 USC § 1983 suitin federal court,

alleging that the City had violated her First Amendment right of access to the courts and seeking damages and injunctive relief. She moved for a preliminary injunction, seeking reinstatement.

The district court denied the injunction, concluding that Rendish failed to make a sufficient showing of a likelihood of success on the merits and that she failed to demonstrate irreparable harm.

Rendish appealed, arguing that the reasons for the public concern element the free-speech context are not persuasive in an access-to-courts claim. She alleged that her loss of constitutional rights constituted an irreparable injury, that the court should analogize her case to a Title VII case and presume irreparable harm, and that the district court failed to recognize the noneconomic, psychological injuries she sustained with the loss of her job.

[1] A review of a claim for retaliation for the exercise of constitutionally protected rights includes a consideration of: (1) whether the plaintiff was engaged in an activity that was entitled to constitutional protection; (2) whether her exercise of the right was a "substantial" or "motivating" factor in defendant's actions; and (3) whether the defendant has established that it would have taken the same action in the absence of the protected conduct.

[2] To be protected by the First Amendment, a public employee's speech must involve a matter of public concern and the employee's interest in commenting on the matter must outweigh any adversly affected interest of the government in promoting the efficient delivery of public services. [3] The question to be answered was whether Rendish's petition rights were entitled to heightened

protection, as compared with her speech rights.

[4] Although the Supreme Court has not addressed whether the public concern requirement applied to a public employee's litigation as well as her speech, the Court has emphasized that the right to petition is cut from the same cloth as other guarantees of that Amendment, and is an assurance of a particular freedom of expression. It follows that the threshold requirement demanded of a public emplyee's speech to receive constitutional protection from adverse employment actions - that is involve a matter of public concern - applies with equal force to a public employee's petition for redress of grievances.

[5] A public employee's litigation must involve a matter of public concern to be protected by either the Petition Clause or the Speech Clause of the First Amendment.

[6] The inquiry into the protected status of speech is one of law, not of fact. Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. [7] Rendish's speech did involve matters of public concern.

[8] A state's burden in justifying a decision to discharge an employee varies depending on the nature of the employee's expression. The balancing test entails an inquiry into whether the speech (1) impairs discipline or control by superiors, (2) disrupts co-worker relations, (3) erodes a close working relationship premised on personal loyalty and confidentiality, (4) interferes with the speaker's performance of duties, or (5) obstructs the routine operation of the office.

[9] Rendish's allegations against the City would necessarily have lead to internal disruption and conflict regarding carrying out the responsibilities of the office. [10] The City was justified in questioning not only the maintenance of professional working relatioships and efficient operation, but also Rendish's loyalty to the City Attorney's office and her individual supervisors, in light of her challenge to their judgment and integrity.

[11] Since the district court accurately assessed that Rendish did not show a likelihood of success, it did not abuse its discretion in finding no irreparable harm based on a loss of Rendish's constitutional rights. [12] In the Ninth circuit, no presumption of irreparable harm arises in a First Amendment retaliation claim and the district court did not abuse its discretion by refusing tto presume injury based on out-of-circuit Title VII authority. [13] Rendish failed to show any noneconomic injury related to the loss of her job, thus the district court did not abuse its discretion in finding that Rendish failed to demonstrate irreparable injury.

COUNSEL

Paul Lindenmuth, Law Office of Neil J. Hoff, Tacoma, Washington, for the plaintiff-appellant.

James W. Feltus, McGavick Graves, Tacoma, Washington, for the defendants-appellees.

OPINION

TROTT, Circuit judge:

OVERVIEW

Kimberly Rendish appeals the district court's denial of her motion for a preliminary injunction. Rendish seeks reinstatement to her position as an Assistant City Attorney pending the outcome of her 42 USC § 1983 lawsuit against the City of Tacoma - her former employer - and various City officials. In her suit, she alleges that the City violated her constitutional right of access to the courts by terminating her in retaliation for filing a lawsuit in state court. The district court denied the injunction, concluding that Rendish failed to make a sufficient showing of a likelihood of success on the merits and that she failed to demonstrate irreparable harm.

In order to receive constitutional protection, a public employee's litigation, like her speech, must involve a matter of public concern, and her interest in the suit must outweigh the government's interest in preventing disruption to its efficient delivery of services to the public. Although Rendish's state court lawsuit does involve matters of public concern, the City's interest in the effective and efficient fulfullment of its public responsibilities outweighs Rendish's interests in pursuing litigation. Accordingly, Rendish has failed to show a likelihood of success on the merits. Moreover, we agree with the district court that Rendish has failed to demonstrate that she would suffer irreparable harm from the denial of a preliminary injunction reinstating her to her former position. We therefore affirm.

BACKGROUND

Beginning in 1990, Rendish was employed as an Assistant City Attorney for the City of Tacoma. The employment relationship between Rendish and the city was strained. On May 13, 1996, Rendish filed a lawsuit in state court, naming as defendants former City Attorney William Barker, former Assistant City Attorney Michael Smith, Municipal Court Judge Ralph Turco, Assitant City Attorney Heidi Horst, and City Attorney Robin Jenkinson. Rendish alleged that city officials denied her a pay raise, suspended her, subjected her to disparate discipline and scrtuiny, and denied her a promotion. She claimed that the City took these actions in retaliation for her speaking out about unlawful discriminatory practices on the part of the City and that the City therefore violated her freedom of speech. Rendish sought damages and an order requiring the City to expunge her personnel file of derogatory remarks and to appoint her to a promoted positon with backpay. The City, on the other hand, contended that Rendish was suspended without pay for three weeks for her failure to follow office policy regarding a domestic violence matter, for misrepresenting the status of a criminal case to a domestic assault victim, and for misleading her supervisor during the resulting investigation. The City further claimed it denied Rendish a pay increase because of her poor work performance.

Rendish served her state-court complaint, with a settlement offer attached, on August 8, 1996. On August 13, 1996, the City suspended Rendish with pay. Claiming that the suspension violated her First Amendment rights, Rendish demanded that the suspension be immediately rescinded. On August 16, 1996, the City terminated Rendish's employment.

On August 21, 1996, Rendish filed this 42 USC §

1983 suit in federal court, alleging that the City had violated her First Amendment right of access tothe courts and seeking damages and injunctive relief. Rendish then moved for a preliminary, seeking reinstatement. The district court denied the injunction, concluding that she failed to make a sufficient showing of a likelihood of success on the merits and that she failed to demonstrate irreparable harm. Rendish appeals.

STANDARD OF REVIEW

The grant or denial of a preliminary injunction is within the discretion of the district court. *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1472 (9th Cir. 1985). We will reserve for abuse of discretion if the decision is premised on an erroneous legal standard or clearly erroneous finding of fact, or if the court misapplied the law on the underlying issues. *Id.*

DISCUSSION

I. Criteria for granting a preliminary injunction

Traditional criteria for granting a preliminary injunction include: 1) a strong likelihood of success on the merits; 2) the possibility of irreparable injury to the plaintiff; 3) a balance of hardships favoring the plaintiff; and 4) the advancement of the public interest. *American Passage Media*, 750 F.2d at 1472. We have articulated numerous tests by which a movant can meet her burden, including a combination of either 1) probable success on the merits and irreparabe injury or 2) serious questions raised and the balance of hardships tips sharply in the movant's favor. *Id.*. The district court relied on the first test to deny the injunction.

II. Rendish's likelihood of success on the merits

A. *Constitutional protection of a public employee's litigation*

[1] In reviewing a claim of retaliation for the exercise of constitutionally-protected rights, we must consider: 1) whether the plaintiff was engaged in an activity that is entitled to constitutional protection; 2) whether her exercise of the constitutionally-protected right was a "substantial" or "motivating" factor in the defendants' action; and 3) whether the defendant has established that it would have taken the same action in the absence of the protected conduct.[5] *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989) (citations omitted); *see Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989).

[2] The Supreme Court has recognzied that a "public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick v. Myers*, 461 U.S. 138, 140 (1983) (citing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)). At the same time, the State's interest in regulating the speech of its employees differs significantly from its interest in regulating the speech of its citizenry. *Id.* To be protected by the First Amendment, a public employee's speech must involve a matter of public concern.

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[5]The parties do not contest Rendish's likelihood of success as to the two causation elements, presumably because Rendish can make a strong showing that her litigation was a motivating factor behind the City's termination decision and that the City otherwise would not have terminated her.

Id. at 146. "If it does, then [the employee] must show that his interest in commenting upon matters of pulic concern outweighs an adversly affected interest of the City in promoting efficient delivery of public services. *Gillette*, 886 F.3d at1197.

The Supreme Court has not considered whether this framework for determining the scope of constitutional protection of a publc employee's speech applies to a public employee's litigation as well. Rendish argues that the reasons for the public concern element in the free-speech context are not persuasive in an access-to-courts claim. The City, on the other hand, argues that the *Connick* requirements of a public concern element and a balancing of interests apply in the retaliation-for-litigation context.

In *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985), we considered a public employee's section 1983 claim alleging that his employer retaliated against him for using internal grievance procedures. Analyzing the claim primarily as one involving speech, we followed *Connick* and held that the First Amendment did not protect "a public employee's right to speech internally about matters of purely personal interest." *Id.* Because the speech involved only personal concerns, we concluded that Gearhart failed to show his conduct was constitutionally protected. Although we recongized that the First Amendment protects both the right to petition and the right to public employees to speak out on public issues, we characterized the employee's internal grievance as speech and did not specifically address whether the Petition Clause independantly protected the grievance or whether the public concern requirement applies to actions protected by the Petition Clause. *Id.* We have subsequently held in a section 1983 retaliation claim outside the public-

employment context that "[t]he right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances." *Sorrano's Gasco*, 874 F.2d at 1314. We now extend our holding in *Gearhart* to public employee's litigation, which is independantly protected by the Petition Clause. We hold that a public employee's litigation must involve a matter of public concern in order to be protected by either the Petition Clause or the Speech Clause of the First Amendment.

[3] At the heart of this case is the question of whether public employee's petition rights are entitled to heightened protection, as compare with their speech rights, or instead, whether their petition rights are limited in the same way as their speech rights. We see no justification under the Supreme Court's jurisprudence to afford enhanced protection to litigation as compared to speech.

In delineating the scope of a public employee's constitutional rights, the Supreme Court has focused on the fundamental design of the First Amendment - to foster participation in the interchange of political and social ideas. In *Connick*, the Supreme Court reviewed the historical evoluation of the rights of public employees, noting that it had gradually recognized the First Amendment rights of such employees to participate in public affairs without suffering retaliatory employment actions.

> In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be

> prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive." The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affiars is no mystery. The First Amendment "was fashioned to assure unfettered interchange of ideas for the brining about of political and social changes desired by the people."

Connick, 461 U.S. at 144-45 (citations omitted). The Court noted that it had "frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Id.* at 145 (citations omitted). This comes as no surprise, because at the center of the Court's concern was ensuring tha tpublic employees maintina thir right to participate in the "free and open debate [which] is vital to informed decision-making by the electorate." *Id.* (quoting *Pickering*, 391 U.S. at 571-72). Notably, the *Connick* Court, in reviewing the development of public employees' rights, discussed precedents involving not only speech rights, but also religious and associational rights. *See id.* at 144.

[4] Although the Supreme Court had not addressed whether the public concern requirement applies to a public employees' litigation as well as her speech, the Court has emphasized that "[t]he right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). In holding that the Petition Clause does not provide absolute immunity for a defendant's libel which was expressed in letters to the President, the Court explained:

> The Petition Clause...was inspired by the same ideas of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition...than other First Amendment expressions.

Id. at 485 (citations omitted). Thus, it follows that the threshold requirement demanded of a public employee's speech in order to receive constitutional prtection from adverse employment actions - that it involve a matter of public concern - applies with equal force to a public employee's petition for redress of grievances.

Although the Supreme Court has not extended *Connick* to litigation claims, we are not the first federal circuit court to reach such a conclusion. In a series of decisions, the Seventh Circuit has comprehensively addressed the First Amendment protection of public employee's itgation and other grievances, holding that, like speech, they must involve a matter of public concern to be constitutionally protection. In *Altman v. Hurst*, 734 F.3d 1240, 1244 n.10 (7th Cir. 1984), the Seventh Circuit noted that the Supreme Court, in indicating that the First Amendment protects a person's right to seek judicial redress for grievances, was concerned about political expression and not about the general right to bring suit. "This formulation dovetails with the *Connick* rule that limits the first amendment protection given public employees to pronouncement on public issues. Thus, a private office dispute cannot be constitutionalized merely by filing a legal action. *Id.* In *Yatvin v. Madison Metropolitan School District*, 840 F.3d 412, 419, 420 (7th Cir. 1988), the Seventh Circuit considered plaintiff

Yatvin's claim that she was not offered a job because she had filed sex discrimination charges against the employer. The court noted:

> The contention that every act of retaliation against a person who files charges for wrondoing with a public agency deies freedom of pseech or the right to petition for redress of grivances rests on the following syllogism: litgiation is a method recognized by the Supreme Court . . . for advancing ideas and seekind redress of grievances; retaliation against one who institutes litigation . . . discourages litigation; therefore such retaliation invades a First Amendment right. The weakness is in the first premise, which is stated too broadly. Some litigation seeks to advance political or other ideas; litgation by the NAACP seeking to elminate public school segregation is an example . . . But not every legal gesture - not every legal pleading - is protected by the First Amendment. Remedies against baseless litigation do not violate the First Amendment's right to petition; nor do laws aimed at deterring "far out" suits by requiring the loser to pay the winner's legal fees.

Id. at 419 (citations omitted). Explaining that not every legal pleading contributes to the marketplace of ideas, and noting "the absence of any attempt by Yatvin to distinguish this case from the run-of-the-mine single-plaintiff discrimination case," the court held that this litigation was not constitutionally protected. *Id.* at 420; *see also Zorzi v. County of Putnam*, 30 F.3d 885, 896 (7th cir. 1994) ("If a public employee is retalatied against for filing a lawsuit, the public employee has no First Amendment claim unless the lawsuit involves a matter of public concern.") (citation and

footnote omitted).

In *Belk v. Minocqua*, 858 F.2d 1258 (7th Cir. 1988), the Seventh Circuit addressed the scope of the Petition Clause's protection of a public employee's right to file an employment grievance. Plaintiff Belk, alleging that she was terminated in retaliation for threatening to file a grievance, argued that she had an absolute right to petition the government, regardless of content. *Id.* at 1260-61. Relying on the Supreme Court's direction in *McDonald*, 472 U.S. at 485, that "there is no sound basis for granting greater constitutional protections to statements made in a petition. . . than other first amendment expressions," the Seventh Circuit explained" "Were we to adopt Belk's position that the right to petition is absolute, we would be guilty of implementing precisely the sort of hierarchy of first amendment rights forbidden by *McDonald*." *Belk*, 858 F.2d at 1261. The court concluded that "such special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form." *Id.* at 1262. The court then held that the substance of Belk's threatened grievance was constitutionally protected only if, as a threshold matter, it touched upon a matter of public concern. *Id.*

[5] We agree with the Seventh Circuit's analysis and with its conclusion that, in order to be constitutionally protected under either the Speech Clause or the Petition Clause, a public employee's actions must involve a matter of public concern.[6] In so holding, we join other circuits

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[6]We do not necessarily agree with the distinction seemingly made by the Seventh Circuit between internal grievances and litigation, analyzing grievances under the Petition

who have similarly agreed that the *Connick* framework applies to petitions and grievances as well as speech. *See Valot v. Southeast Local Sch. Dist. Bd. Of Educ.*, 107 F.3d 1220 (6th Cir. 1997) (analyzing substitute bus drivers' section 1983 claim that school district failed to rehire them in retaliation for filing workers' compensation claims as a claim under the Petition Clause, applying the same analysis as a claim arising under the Free Speech Clause, and requiring public concern), *petition for cert. filed*, 66USLW 3086 (July 10, 1997) (No. 97-74); *Grabow v. Indepdnatn Shc. Dist. No. 1-008*, 86 F.3d 1166 (10th Cir. 1996) (unpushlished; citation permissible under 10th Cir. rules) (concluding that a public employee's EEOC claim must involve a matter of public concern to be entitled to First Amendment protection); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2d Cir. 1993) (holding that the First Amendment right to petition - here, an internal personnel complaint - is subject to the same analysis as free speech); *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696 (5th Cir. 1985) (stating that the protection afforded by the Petition Clause overlaps with that afforded by other First Amendment provisions).

The Seventh Circuit's conclusion that a public employee's litigation or grievance must involve a matter of public concern to be constitutionally protected is not, however, universally accepted. The Third Circuit alone has diverged from the other circuits and has held that a public employee is protected under the Petition Clause against

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Clause (*Belk*) and litigation primarily under the Free Speech Clause (*Altman*, etc.), in contrast with our framework outlined in *Gearhart* and *Sorrano's Gasco*. However, because we believe that the speech analysis set forth in *Connick* applies with equal force to petition claims, we find this disagreement immaterial.

retaliation for having filed a lawsuit even if that lawsuit adresses matters of purely private concern. *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). Examining whether "there are contexts in which the petition clause protects values additional to those protected by the speech clause," *id.* at 439, the Third Circuit concluded that a reason independant of the speech considerations relied upon by the Seventh Circuit in *Altman, Yatvin,* and *Belk* justified the protection of employee lawsuits and grievances regardless of content:

> The first amendment's petition clause imposes on the United States an obligation to have at least some channel open for those who seek redress for perceived grievances . . . [W]hen government - federal or state - formally adopts a mechanism for redress of those grievances for which the government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking that mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur.

Id. at 442. Noting that "[t]he petition clause of the first amendment was not intended to be a dead letter - or a graceful but redundant appendage to the clauses guranteeing freedom of speech and press," the Third Circuit held that a grievance or lawsuit, brought by a public employee, that constituted a "petition" and that was "non-sham," was constitutionally protected, regardless of whether it involved a matter of public concern. *Id.*

We respectfully disagree with the Third Circuit's analysis. First, it diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantess to public employees in order to encourage such participation. Moreover, it equates the governments conduct as employer with its conduct as government. When government as employer disciplines an employee for pusuing litigation, it does not act as "the very government" which establishes the mechanism for redress in accordance with its consitutional obligation, but rather than its role as an employer.

We do not mean to suggest, of course, that public employees may be denied access to the courts altogether. We simply hold that a public employee cannot resent a cognizable section 1983 claim challenging a retaliatory employment decision made by her government-employer unless her litigation involves a matter of public concern. As the Supreme Court explained in *Connick*:

> We hold only that when a public employee speeks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegeldy in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for

the state.

461 U.S. at 147 (citations omitted).

Regardless of whether the right to grieve an employment dispute is characterized as the exercise of the right to petition or the right to free speech, the same public concern requirement appplies. At is core, the First Amendment protects an array of behavior and activities for the same fundamental reason. Thus, heeding the Supreme Court's warning, we do not elevant the right to litigate above the right to free speech.[7]

B. *Application of the law to Rendish's claim*

We now consider the district court's conclusions regarding whether Rendish's litigation involved a matter of public concern and whether Rendish's interest in the litigation outweighed the City's interest in promoting the efficient delivery of public services.

1. *Public concern*

[6] The inquiry into the protected status of speech is one of law, not of fact. *Connick*, 461 U.S. at 148 n. 7.

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[7]We do not mean to imply that all First Amendment rights must be treated the same in the public-employment context. For example, the Fifth Circuit has held that " '[a] public employee's claim that he has been discharged or his political affiliation in violation of his right to freely associate is not subject to the threshold public concern requirement.' " *Boddie v. City of Columbus, Miss.* 989 F.2d 745, 747 (5th Cir. 1993) (quoting *Couglin v. Lee*, 946 F.2d 1152, 1158 (5th Cir. 1991)). We limit our holding to a public employee's right to pursue litigation, as protected by either the Speech Clause or the Petition Clause.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Speech relating to any matter of political, social, or other concern to the community is protected. *See id.* at 146.

In *Voight v. Savell*, 70 F.3d 1552 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1826 (1996), a state court clerk was terminated for, among other things, criticizing the presiding judge's selection of a court administrator and his determination that an employment applicant's grievance against the clerk was valid. We determined that Voight's comments primarily criticized internal personnel matters. *Id.* at 1560. "Such information carries little public import in that it does not seek to inform the public of Judge Savell's failure to discharge his duties as a judicial officer." *Id.* Nonetheless, we concluded the speech was not "utterly devoid of public concern" because the speech referred to unfair discrimination and unfair treatment of job applicants, matters of public concern. *Id.; see also Gillette*, 886 F.2d at 1197-98 (firefighter's speech criticizing other firefighter's interaction with a victim involved a matter of public concern); *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (memorandum that "exposed abuses, inefficiency, threats to public safety, potential civil rights violations, and incompetance of public law officials at Juvenile Hall" discussed issues that were "of vital interest to citizens in evaluating the performance of their government" and thus satisfied the public concen requirement).

In her state lawsuit, Rendish claimed as th reasons for the adverse actions: 1) that Judge Turco demanded that she be fired or disbarred because she had spoken with a

reporter about allegedly inappropriate remarks by Judge Turco; 2) that she supported the unsuccessful efforts of Sharolyn Bass, a disabled candidate, to obtain employment with the City; 3) that she spoke out about the alleged improper disposition of criminal cases for friends and city employees; and 4) that she supported a challenger to a sittle municipal court judge.

[7] The district court concluded that it was not apparent that any of these claims involved a matter of public concern, although the third claim was the most likely of the four to involve a public issue. We conclude on balance that Rendish's speech did involve matters of public concern. A municipal court judge's allegedly inappropriate remarks made in domestic violence cases implicate the public's interest in the impartial administration of the courts. Rendish alleged that the City refused to hire Bass because of her disability (and testified in Bass' discrimination suit against the City); the public has an interest in unlawful discrimination by the City. As the district court did recognize, the unequal treatment of some persons as compared with others by the City's judicial systems is an issue of public concern. Finally, Rendish's allegation that her supervisors expressed displeasure with her for supporting a judicial candidate other than a sitting judge raises questions regarding coercion of, or retaliation of, political beliefs. *See Connick*, 461 U.S. at 149 (question inquiring about whether employees felt pressure to work in political campaigns on behalf of office-supported candidates touched on matter of public concern because such pressure constitutes an unconstitutional coercion of beliefs). Although the district court aptly pointed out that whether Rendish can prove the truth of any of her allegations remains to be seen, the allegations nonetheless do involve matters of public concern.

We further conclude that Rendish's demand for only private relief in her state-court lawsuit does not detract from the public nature of the litigation, because the speech Rendish claims resulted in the adverse employment actions involves matters of public concern. In *Zorzi v. County of Putnam*, the Seventh Circuit similarly concluded that the fact that plaintiff's suit grew out of a personal dispute and that the plaintiff sought remedies of personal nature did not prevent suit from being a matter of public concern: "this suit involves a broader dispute and seeks to remedy a systematic harm. Zorzi was allegedly fired for her political support of the state's attorney." 30 F.3d at 897. Thus, Rendish's claim passes the first test: it involves matters of public concern.

2. *Balancing the City's and Rendish's interests*

[8] Because we conclude that Rendish's litigation concerns matters of public interest, we next review the district court's determination that the City's interest in the efficient management of its operations outweighs Rendish's interest in commenting upon these public matters. *Connick*, 461 U.S. at 142. A state's burden in justifying a decision to discharge an employee varies depending upon the nature of the employee's expression. *Id.* at 150.

> Application of this balancing test entails a factual inquiry into such matters as whether the speech (i) impairs discipline or control by superiors, (ii) disrupts co-worker relations, (iii) erodes a close working relationship premised on personal loyalty and confidentiality, (iv) interferes with the speaker's performance of her or his duties, or (v) obstructs the routine operation of the office. The "manner, time, and place" in which the speech

occurred also constitute relevant considerations.

Hyland, 972 F.2d at 1139 (citations omitted). Disruption must be "actual, material and substantial" not "imagined." *Id.* at 1140. However, the employer need not "allow events to unforld to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action," *Connick*, 461 U.S. at 152. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.* at 151-52.

Determining the extent of Rendish's disruption of office operations necessarily involves a factual inquiry into the nature of Rendish's duties and relationships with co-workers and supervisors, as well as the impact of the pending litigation on the overall functioning of the office. This factual inquiry is essential because the importance of close working relationships and the need for an orderly working environment often will not outweigh an employee's right to pursue litigation of public import.

Although this case comes before us at an early state in the proceedings, the district court's inquiry and conclusions regarding the City's need for efficient and effective management are well-supported. A preliminary application of the *Hyland* considerations are justified. The City identified several concerns regarding the effect of Rendish's lawsuit, which included: 1) cooperative relationships within the office and between Rendish and her supervisors would be difficult; 2) Rendish could not fulfill her duties in Judge Turco's court; and 3) Rendish's demonstrated lack of trust and confidence in the department would compromise her performance.

[9] Although professionals ordinarily may be expected to leave pending litigation outside of the office, herein, that possibility was manifestly not realistic. Perhaps the most disruptive aspect of this situation is that Rendish's charges go to the core of her employer's mission. Rndish contends that the City Attorney's office, whose public function is to uphold and enforce the law, was deliberately violating the law. These allegations necessarily lead to internal disruption and conflict regarding carrying out the responsiblities of the office. There can be no doubt that loyalty and confidentiality are essential to the effective performance of the City Attorney's office. Rendish's supervisors, however, assert that they no longer have trust and confidence in Rendish and speculate that she would no longer follow their directions. These concerns are understanable in light of Rendish's allegations, which question the legal judgment and integrity of the City officials. Moreover, the history of the relationship between Rendish and the City is acrimonious. For example, a letter signed by Rendish's attorney heatedly stated that the City's behavior showed "a complete absence of intelligence" and charged the City with being "simply clueless as to the rights of their employees."

[10] The district court found that "[t]he City outlined obvious and real concerns" regarding the breakdown of interpersonal relationships and Rendish's comprised efficiency. Although Rendish disputes the City's conclusion regarding (1) the importance of close working relationships, (2) her comprised efficiency, and (3) the potential disruption of office functions, there is no evidence that the district court's findinds were clearly erroneous. The City is justified in questioning not only the maintenance of professional working relationships and efficient operation, but also Rendish's loyalty to the City

Attorney's office and her individual supervisors, in light of her challenge to their judgment and integrity.

III. Irreparable injury

The district court found that Rendish failed to demonstrate irreparable injury. Rendish alleges: 1) that her loss of constitutional rights constitutes irreparable injury; 2) that the court should analogize her case to a Title VII case and presume irreparable harm; and 3) that the district court failed to recognize the noneconomic, psychological injuries she sustained with the loss of her job.

[11] In *Romero Feliciano v. Torres Gaztambide*, 836 F.2d 1, 4 (1st Cir. 1987), the First Circuit concluded that the district court did not abuse its discretion in finding that a plaintiff who was likely to succeed on the merits of his First Amendment claim suffered irreparable harm by being penalized for exercising his constitutional rights. *See also Mariani Giron v. Acevedo Ruiz*, 834 F.2d 238, 239 (1st Cir. 1987) (finding irreparable harm "due to the nature of the First Amendment rights violated by an impermissible political firing"). However, the finding of irreparable harm depended upon the plaintiff's success on the merits. *Romero Feliciano*, 836 F.2d at 4. Because the district court's assessment that Rendish did not show a likelihood of success was accurate, it did not abuse its discretion in finding no irreparable harm based on a loss of her constitutional rights.

[12] Relying solely on *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167 (11th Cir. 1988), Rendish next argues that the district court should have presumed irreparable harm. In *Baker*, the Eleventh Circuit held that a district court erred in not conducting an evidentiary hearing to

determine whether the defendant could overcome the Title VII plaintiff's rebuttable presumption of irreparable harm. *Id.* at 169. *Baker* is inapplicable here. In this circuit, no presumption of irreparable harm arises in a First Amendment retaliation claim, and the district court did not abuse its discretion by refusing to presume injury based on out-of-circuit Title VII authority.

[13] Finally, Rendish fails to show any noneconomic injury releated to the loss of her job. Thus, the district court did not abuse its discretion in finding that Rendish failed to demonstrate irreparable injury.

CONCLUSION

We conclude that a public employee's litigation, like her speech, must involve a matter of public concern in order for that employee to be constitutionally protected from retaliatory employment action. Here, although Rendish's state-court litigation involves matters of public concern, the City's interest in preventing the disruption which it persuasively predicts would necessarily result from Rendish's presence during the pendance of the lawsuits outweighs Rendish's interest in litigating the public matters she raised. Therefore, the district court correctly concluded that Rendish's showing of a likelihood of success is not strong. Additionally, the district court properly determined that Rendish had not adequately demonstrated irreparable injury. We therefore affirm the district court's denial of Rendish's motion for a preliminary injunction.

AFFIRMED.

APPENDIX B

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.[8]

REINHARDT, Circuit Judge, with whom Judge TASHIMA joins, dissenting from the failure to rehear en banc:

I respectfully dissent from the court's failure to rehear this case en banc.

The panel's holding that a public employee (an assistant city attorney) may be fired from her job for filing a good faith lawsuit against her employer - a law suit that concededly raises important issues of public concern - mocks the very purpose of the First Amendment's Petition Clause and debases our commitment to the legal system. It

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[8]The motion to supplement the Excerpt of Record is denied.

will certainly come as a surprise to those who have taken seriously our assertions that persons with legitimate grievances should settle their disputes by peaceful means in the courts rather than through disruptive or militant extra-legal actions. The message we send to public employees and others today is quite the opposite: if you avail yourself of the judicial process, you face termination from your employment and possibly other equally painful consequences; accordingly, you had best seek your remedies elsewhere.

Disregarding basic tenets of liberty and security, the panel holds that the filing of a legitimate lawsuit to protect one's job rights and to expose governmental corruption and discrimination is grounds for discharge, no matter how meritorious the suit.[9] In doing so, it also ignores direct circuit precedent to the contrary and creates an entirely unjustified aberration in this court's First Amendment jurisprudence. There is no excuse for allowing this opinion to remain on the books, not even the absence of over a third of our authorized number of judges.

Kimberly Rendish was an Assistant City Attorney for the City of Tacoma. She alleges, and the panel accepted as true, that in the course of her employment, a municipal court judge, "Judge Turco[,] demanded that she be fired or disbarred because she had spoken with a

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[9]I should note at the outset that the public employee involved is not a "policymaker" and thus is not subject to the "policymaker" exception, *see, e.g., Fazio v. City and County of San Francisco,* 125 F.3d 1328 (9th Cir. 1997), which allows public employers to require top level employees to adhere to department policies. For obvious reasons, that rule does not apply to lower-level employees, such as the plaintiff in this case.

reporter about allegedly inappropriate remarks by Judge Turco"; that she made known her opposition to the City's discriminatory hiring practices; and that she spoke out about the "improper disposition of criminal cases for friends and city employees." *Rendish v. City of Tacoma*, 123 F.3d 1216, 1224 (9th Cir. 1997). In response to her lawful and proper actions, "City officials denied her a pay raise, suspended her, subjected her to disparate discipline and scrutiny, and denied her a promotion." *Id.* at 1218. Rendish eventually brought a lawsuit in state court against the City, claiming that the City took these actions in retaliation for her speaking out about the City's improper and unlawful practices "and that they City therefore violated her freedom of speech." *Id.* Eight days after Rendish filed her action, the City escalated its assault on her constitutional rights, and fired her for having the audacity to sue the sovereign. She then brought this § 1983 lawsuit in federal court, alleging that the City's retaliatory discharge violated her First Amendment right to access to the courts.

The panel in no way questions the legitimacy of the claims asserted in Rendish's lawsuits and presumes that the City fired her because of her decision to seek relief in the courts. *Id.* at 1219 n. 1. It nevertheless upholds the district court's denial of her request for a preliminary injunction on the ground that because "Rendish's charges [of unlawful discrimination, corruption, and retaliation] go to the core of her employer's mission" - i.e., "to uphold and enforce the law" - the City's interest in avoiding "disruption and conflict" in its workplace outweighs Rendish's interest in pursuing the litigation. *Id.* At 1225. The thrust of the panel's decision is clear: the City is free to fire Rendish for filing a meritorious lawsuit designed to vindicate her efforts to expose discrimination and

corruption, because the exposure of such unlawful conduct would interfere with the City's regular or routine method of operations.[10]

The panel's conclusion is not only wholly inconsistent with the First Amendment, but it is contrary to the basic policies that underlie our legal system. Rendish's charges of corruption in the handling of criminal cases and of employment discrimination are extremely serious and of great public concern. Whatever may ultimately prove to be the case regarding their validity, for present purposes I, like the panel, must assume that the facts are as stated by Rendish. Given these facts, Rendish is surely entitled to file a lawsuit seeking relief from unlawful retaliation for exposing improper and wrongful governmental action, and may not be discharged for doing so. Punishment by the government of public employees for their use of the courts to vindicate their rights regarding matters of public concern should strike any judge as clearly impermissible and unconstitutional governmental action. Moreover, contrary to the panel's view, the seriousness of Rendish's allegations *underscores*, rather than diminishes, the need for constitutional protection from a retaliatory discharge for an entirely proper and appropriate use of the legal system.[11]

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[10]Technically, the panel concluded Rendish was not entitled to a preliminary injunction ordering reinstatement. This determination, however, explicitly rested on the panel's decision that Rendish had not demonstrated irreparable injury, but did so primarily because it determined that she was not likely to succeed on the merits. *See* 123 F.3d at 1225-6.

[11]There is no contention that Rendish should have pursed her claims in any other forum. Under the panel's view of the law,

The panel reaches its perverse conclusion only as a result of committing two fundamental errors: (1) it applies a balancing test to Rendish's retaliatory discharge claim in a manner that directly contravenes recent Ninth Circuit and Supreme Court precedent; and (2) it erroneously equates a discharge based on a petition for redress of grievances - the filing of a good faith lawsuit of public concern- with a discharge based on an employee's conduct regarding purely private matters in or about the workplace.

In beginning its analysis, the panel accurately states that when a public employee is disciplined for making complaints regarding workplace matters of public concern, a city may escape § 1983 liability only if the employee's action adversely affects the city's interest in efficient management of its operations in a manner that outweighs the plaintiff's interest in bringing the matters to the attention of the public. *See* 123 F.3d at 1224-25 (citing *Connick v. Myers,* 461 U.S. 138, 142); *see also Hyland v. Wonder,* 972 F.2d 1129, 1139 (9th Cir. 1992), *cert. denied,* 508 U.S. 908 (1993). But the panel's willingness to follow - or even to acknowledge - precedent abruptly ends here.

It is elementary First Amendment law that "[t]he more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Hyland,* 972 F.2d at 1139 (citing *Connick,* 461 U.S. at 150). Yet while it purports to "balance" the parties' interests, the panel completely fails to consider or discuss the importance of Rendish's interest. If it had acknowledged that interest, it would have had to recognize

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it appears that her only permissible course of action was to remain silent regarding the state's unlawful and corrupt conduct.

that actions that "seek to bring to light actual or potential wrongdoing or breach of public trust" are matters not only of vital importance to the individual but of *great public concern* as well. *See Connick*, 461 U.S. at 148. Rendish's state lawsuit involved the City's attempt to suppress her statements exposing corruption, discriminatory hiring, and disparate treatment; it was, therefore, of great public concern and entitled to an extremely high level of protection.

Even worse, in siding with the City, the panel finds Rendish's actions "most disruptive" because she charged the City with violating the "core" of its mission by "deliberately violating the law." 123 F.3d at 1225. Yet this court has unequivocally held that, under *Connick* and *Pickering v. Board of Educ.*, 391 U.S. 363 (1968), any disruption resulting from a government entity's improper or unlawful actions affects a *wholly illegitimate* interest, which *cannot* weigh in favor of the government. "Defendants cannot rely on disruption which they instigated or exacerbated to outweigh [the plaintiff's] first amendment claims." *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1408 (9th Cir. 1988). A governmental entity must "do more than show mere disruption. Instead, it must show actual injury to its *legitimate* interests." *Johnson v. Multnomah County*, 48 F.3d 420, 427 (9th Cir.), *cert. denied*, 515 U.S. 1161 (1995). Under the panel's through-the-looking-glass view of the Constitution, however, the more grave the violation of the government's fundamental obligations, the greater the "disruption" that "necessarily" occurs, 123 F.3d at 1225, and, therefore, the less protection the employee receives for exposing the wrongdoing - or for seeking to be treated in the manner required by law.

The panel's approach is directly contrary to our holding in *Johnson* only two years ago, which remains good

law but is not even so much as mentioned by the panel:

> An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office....In other words, the County does not have a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure. Nor are the County's legitimate interests injured if [the boss] was undermined by truthful statements exposing his own wrongdoing. If we were to hold otherwise, "[s]ome of the most important public employee speech - exposing government corruption, wrongdoing, or incompetence - would be left outside the First Amendment aegis." *Hyland v. Wonder*, 972 F.2d at 1138.

Id. at 427 (internal quotation marks and citation omitted); *see also Roth*, 856 F.2d at 1407-08 (same). The principle set forth in *Johnson* and *Roth* renders completely meritless the panel's specific examples of disruption due to Rendish's lawsuit - that "Rendish's superiors...assert that they no longer follow their directions," and that "the relationship between Rendish and the City is acrimonious," 123 F.3d at 1225.

Indeed, the panel gets its exactly backwards. It is impossible to reconcile the panel's opinion with *Johnson* - and the universal agreement with *Johnson's* reasoning

among all circuits that have confronted the issue.[12] Nor does the panel even try. Instead, it completely ignores not only *Johnson* and *Roth* but the cases decided by the other circuits. As a result, with the failure of a majority of the active judges of this court to case affirmative votes for an en banc hearing, we create an unprecedented rule of law that would allow city officials, in effect, to *benefit* from their unlawful and discriminatory behavior; the more outrageous their actions, and the more divisive the results, the *greater* their freedom to fire honest civic-minded employees and the greater the immunity from retaliatory discharge claims they will enjoy for their unlawful actions.

The indefensible result reached by the panel in this case illustrates the fundamental absurdity of its holding that the filing of a legitimate lawsuit of public concern is a proper ground for discharging a public employee. The panel fails to recognize that filing a lawsuit , unlike merely speaking out, is a special "manner," *Connick*, 461 U.S. at 152, of First Amendment expression that is entitled to even greater protection than ordinary First Amendment speech. That special "manner" involves the use of the Petition Clause, a unique process for resolving disputes between individuals and the government, explicitly established by the Constitution. Here, the plaintiff invoked that process by resorting to the courts, the final arbiter of legal rights in a law-abiding society.

The panel's feeble justification for ignoring the

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[12]*See O'Donnell v. Yanchulis*, 875 F.2d 1059, 1062 (3rd Cir. 1989); *Conaway v. Smith*, 853 F.2d 789, 797 (10th Cir. 1988); *Hughes v. Whitmer*, 714 F.2d 1407, 1423 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); *Porter v. Califano*, 592 F.2d 770, 773-74 (5th Cir. 1979).

impact of the Petition Clause consists of its recitation out of context of the Supreme Court's dicta from *McDonald v. Smith*, 472 U.S. 479, 485 (1985), that "[t]he right to petition is cut from the same cloth as the other guarantees of [the First] Amendment." *McDonald*, however, had absolutely nothing to do with the use of the *courts* by public employees or others. Rather, the case concerned the question whether a libelous letter written to President Reagan about a U.S. attorney candidate deserves special protection because it could be characterized as a "petition." When a public employee seeks *access to the courts* - the forum established by the government for aggrieved persons to obtain redress for injuries inflicted upon them by the government - something far more than even free expression is at stake. The very right to require the government to obey the law and to redress the injuries it causes its citizens is at issue. That right may not be lightly limited - or made to serve as the basis for punitive or retaliatory governmental action.

The panel also makes it appear that its holding that a public employee may be fired for availing himself to the right to seek judicial relief when the government acts unlawfully is in line with the law in a majority of the circuits. "The Third Circuit alone," it claims, "has diverged from the other circuits and has held that a public employee is protected under the Petition Clause against retaliation for having filed a lawsuit." 123 F.3d at 1222. In fact, only *one* circuit, the Seventh, has stated that a public employee might, under some circumstances, be fired for filing a good faith lawsuit regarding a matter of public concern. *See Zorzi v. County of Putnam*, 30 F.3d 885, 895-96 (7th Cir. 1994). But even that circuit has *never* upheld such a termination; nor has it ever intimated that a governmental employer could escape liability for any such termination on the basis

of a workplace disruption caused by its own unlawful conduct. *See, e.g., id. at* 898; *Marshall v. Allen*, 984 F.2d 787, 797 n.8 (7th Cir. 1993). The only circuit other than the Seventh to address the question whether a public employee can be fired for filing a good faith lawsuit answered with a resounding "no". *See San Filippo v. Bongiovanni*, 30 F.3d 424, 434-43 (3rd Cir.), *cert. denied*, 513 U.S. 1082 (1995). In fact, the Third Circuit extended its reasoning to matters of private concern as well. Whether or not we should extend First Amendment protection that far, certainly the Third Circuit is right that, at least when a petition takes the form of a lawsuit, "the mere fact of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee." *Id.* at 443.[13]

I believe that, under the Constitution, the government cannot fire an employee for utilizing the courts to seek redress for injuries involving matters of public concern. I further believe that any "disruption" in the

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[13]All other cases cited by the panel that have upheld the discharge of a public employee have carefully noted, in line with the Court's emphasis in *Connick*, 461 U.S. 149, 153, that the employees (1) complained of matters of purely private concern and (2) often pursued internal grievance procedures, thereby rendering their grievances less worthy of First Amendment protection. *See Valot v. Southeast Local Sch. Dist. Bd. Of Educ.*, 107 F.3d 1220 (6th Cir.) (matter of private concern, i.e., alleged failure to accommodate disability, ruled unmeritorious by EEOC and court and that was unrelated to employee's discharge); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1060-61 (2d Cir. 1993) (internal personnel complaints which, in any event, were not the cause of firing); *Day v. South Park Indep. Sch. Dist.*, 786 F.2d 696 (5th Cir. 1985) (matter of private concern pursued in internal grievance to teacher's superior).

workplace that "necessarily" results from the exposure of the government's own unlawful conduct cannot outweigh the individual's First Amendment rights or the public's interest in the matter. I would hope that a majority of this court will see the wisdom of these far from novel constitutional precepts the next time we have the opportunity to reconsider the holding we erroneously permit to become circuit law today.

APPENDIX C

48 USC § 1983

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended Oct. 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853).

THE UNITED STATES CONSTITUTION

Article IV

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities to Citizens in the several states.

Amendment [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Amendment [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation.

Amendment [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FILED
MAY 29 1998
OFFICE OF THE CLERK

No. 97-1735

In The

Supreme Court of the United States

October Term, 1997

KIMBERLY RENDISH,

Petitioner,

vs.

CITY OF TACOMA; RAY C. CORPUS, City Manager for the City Manager for the City of Tacoma, in his individual capacity; ROBIN JENKINSON, City Attorney for the City of Tacoma, in her individual capacity; JOHN KOUKLIS, Chief Assistant City Attorney for the City of Tacoma, in his individual capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES W. FELTUS
Counsel of Record
McGAVICK GRAVES, P.S.
K. MICHAEL JENNINGS
Attorneys for Respondents
1102 Broadway, Suite 500
Tacoma, Washington 98401
(253) 838-2860

146660

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

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16 pp

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OPINIONS AND ORDERS BELOW

Rendish v. City of Tacoma, 123 F.3d 1216 (9th Cir. 1997).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Procedural Background

The case at hand was initially filed by Petitioner, Kimberly Rendish ("Rendish"), in the United States District Court for the Western District of Washington at Tacoma on August 21, 1996. On September 2, 1996, Rendish filed a Motion for Preliminary Injunction Reinstating Petitioner to Employment and Prohibiting Retaliatory Adverse Action during the pendancy of this action. On October 10, 1996, the District Court denied Rendish's motion for preliminary injunctive relief and denied her Motion for Reconsideration on October 28, 1996. The District Court found that Rendish's likelihood of success on the merits was weak and that she had failed to establish non-economic damages.

Rendish filed a Notice of Appeal on October 25, 1996, appealing the District court's decision under 28 U.S.C. § 1292(a)(1). In spite of the interlocutory appeal, the case continued toward trial until a stay was issued by the District Court on November 12, 1997. The United States Court of Appeals for the Ninth Circuit, in a unanimous opinion, affirmed the decision of the District Court on August 20, 1997, holding the District Court correctly concluded that Rendish's showing of likelihood of success on the merits was not strong and that the District Court properly determined that Rendish had not adequately demonstrated irreparable injury. The United States Court of Appeals for the Ninth Circuit also determined that the District Court properly analyzed the case when it held that in order for Rendish to pursue her claim that she must show that her claim involves a matter of "public concern" and that the "public concern", on balance, outweighs the City's interest in maintaining an effective and efficient City Attorney's office. On August 29, 1997, Rendish filed a Petition for Rehearing

and Suggestion for Rehearing en banc with the United States Court of Appeals for the Ninth Circuit. Her Petition for Rehearing and Suggestion for Rehearing en banc was denied on January 26, 1998.

The instant case is scheduled for trial in the United State District Court for the Western District of Washington on December 28, 1998.

B. Factual Background

Rendish began her employment with the City of Tacoma as an intern while she was still attending law school. Following her graduation, in 1988, Rendish, in 1990, accepted a position with the City of Tacoma in the City Attorney's Office, Criminal Division, as an Assistant City Attorney I. On August 16, 1996, Rendish was terminated from her Assistant City Attorney I position because of her conduct which greatly compromised the effectiveness and efficiency of the delivery of services of the City Attorney's office.

The problems created by Rendish within the City Attorney's office stemmed from the disruption, loss of confidence and trust, internal scheduling difficulties, and supervisory obstacles created by a law suit filed on August 8, 1996, by Rendish, in the Superior Court for the State of Washington. In her suit, Rendish named as defendants, the City of Tacoma, her immediate supervisor, the City Attorney, the Chief Assistant City Attorney, a sitting Municipal Court judge, the immediate former City Attorney, and a former Assistant Attorney. Her suit, for a variety of reasons, compromised the effectiveness and efficiency of the City Attorney's Office, and undermined the trust and confidence necessary to effectively serve as an Assistant City Attorney. (DN 16 and 17).[1]

The proper functioning of the Criminal Division of the City Attorney's office requires that the attorneys work closely with one

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1. DN refers to the District Court docket number.

another, have confidence in one another's capabilities, freely exchange ideas and suggestions, fill in for one another with little notice, attend court in all Municipal courts, and cooperate with one another in a manner that promotes the objectives of the City Attorney's office. Rendish's suit undermined these objectives and reflected that Rendish had lost trust and confidence in the City Attorney and her supervising attorney. (DN 17).

Scheduling problems within the City Attorney's Office were created because Rendish sued a sitting Municipal Court Judge, Ralph Turco. (DN 16). Judge Turco presides over one of three Tacoma Municipal courts. Because Rendish filed suit against Judge Turco, Judge Turco would have been forced to recuse himself from any case that involved Rendish. This is the case because he must maintain the appearance of fairness within his court. It was thus impossible for him to preside over any matter directly or indirectly involving Rendish. (DN 14). The practical effect of this circumstance is to increase costs and compound scheduling and staffing problems in the City Attorney's Office: Rendish would be unable to appear in Judge Turco's courtroom as a regular part of her duties, she would be unable to assist on an emergency basis, and she would be unable to charge crimes as part of her regular duties. These are functions regularly required of Assistant City Attorneys in Rendish's position. There was no solution which would reasonably accommodate Rendish's continued employment with the City. (DN 16).

The effectiveness of the City Attorney's Office was greatly compromised because Rendish sued her immediate supervisor, the Chief Assistant City Attorney, and the City Attorney. Rendish's work performance for many years had been weak and at times unsatisfactory. (DN 15). The City Attorney's Office worked with Rendish over a number of years in an effort to

develop her lawyering skills and the type of collegial relationship necessary for effective and efficient operation. This was done despite serious performance problems of Rendish including several mistrials resulting from Rendish commenting on a criminal defendant's silence and her misrepresenting the disposition of a criminal matter to the victim of domestic violence and to her supervisor who internally investigated the matter. (DN 15). Even after Petitioner filed the state court action, the City placed Petitioner on a paid administrative leave. Nevertheless, her suit destroyed the trust and confidence between herself, the City Attorney and her immediate supervisor. (DN 17).

Supervision of Rendish by her immediate supervisor, Heidi Horst, would likely become more strained if not destroyed if Rendish were allowed to maintain her employment within the City Attorney's office. (DN 16). Prior to the initiation of the state court action, this relationship was marked by intimidation and defensiveness. The strained and intimidating relationship between Rendish and her immediate supervisor, Heidi Horst, is punctuated by the fact that, since 1993, Rendish insisted that her attorney be present during all of her performance reviews. It would be nearly impossible for Ms. Horst to effectively supervise or discipline Rendish when they are adversaries in a lawsuit in which Ms. Horst was a defendant. Ms. Horst justifiably believed that her ability to supervise Rendish was diminished once she became a defendant and her ability to give Rendish day to day instruction that Rendish would follow was adversely affected. She also noticed that after the suit was filed, attitudes among attorneys and staff in the City Attorney's Office were very strained. Through her own acts, she created a contentious, hostile, divisive, and intolerable working relationship between herself, her immediate supervisor, her co-workers and the City Attorney. She demeaned the integrity of the Office of the City Attorney. Her personal attack upon her supervisor and the City

Attorney undermined their authority and created a difficult obstacle for effective supervision. The close working relationship that must exist within the City Attorney's office was tenuous but manageable prior to Petitioner's initiating legal action. The relationship became untenable and unmanageable following the filing of the state court action. (DN 16).

Rendish was not terminated in retaliation for filing her state court action. Rendish was terminated because of the effect her state court action had on the operation of the City Attorney's office and its impact on the effective and efficient delivery of public services to the City of Tacoma. (DN 17).

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DID NOT ENTER A DECISION IN CONFLICT WITH DECISIONS OF ANOTHER UNITED STATES COURT OF APPEAL ON THE SAME IMPORTANT MATTER.

The United States Court of Appeals for the Ninth Circuit followed the majority line of reasoning in requiring Rendish to establish that her suit involved a matter of "public concern" as a necessary predicate to establishing a First Amendment right and that if her claim did involve a matter of "public concern" that it not be outweighed by contravening aspects of the conduct in question that reduce the effectiveness and efficiency of the delivery of governmental services. *See Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir. 1998); *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997); *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1226 (6th Cir. 1997), *cert denied*, __ U.S. __, 118 S. Ct. 164; *Graybo v. Indep. Sch. Dist. No. I-*

008, 86 F.3d 1166 (10th Cir. 1996) (unpublished; citation permissible under 10th Circuit rules); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2nd Cir. 1993), *cert denied*, 510 U.S. 865; *Hoffmann v. Mayor, Councilman and Citizens of City of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir. 1988); *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 701 (5th Cir. 1985), *cert denied*, 474 U.S. 1101 (1986). The only circuit failing to require a showing of "public concern" when analyzing government employee claims that a government employer's adverse employment action is barred by the First Amendment is the Third Circuit. *See San Filippo v. Bongiovanni*, 30 F.3d 424, 436 (3rd Cir. 1994), *cert denied*, 513 U.S. 1082 (1995). It is doubtful that *San Filippo* has effect beyond its unique and complex procedural and factual circumstance.

The Ninth Circuit adheres to the clear majority of cases that have addressed issues similar to those presented in Rendish's petition. The approach adopted by the Ninth Circuit in *Rendish v. City of Tacoma, supra*, properly balances the individual employee's interest in airing matters of public concern versus the government employer's interest in maintaining the effective and efficient delivery of public services when the matters of public concern are disruptive or otherwise compromise the effective and efficient delivery of public services.

Whether the District Court, in the case at hand, properly denied Rendish's request for Preliminary Injunction, because she failed to carry her burden of proof, turns on facts specific to the case at hand and the unusual procedural posture of the case at hand. For example, at the District Court, the burden was on Rendish to produce sufficient evidence establishing her entitlement to a preliminary injunction. *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1472

(9th Cir. 1985). Rendish's primary source of evidence at the District Court were her own affidavits which were vague and conclusory. Her affidavits did not offer a sufficient factual basis to support her motion, and her reliance on innuendo was rejected by the District Court and the United States Court of Appeals for the Ninth Circuit. Similarly, Rendish was unable to offer evidence of irreparable harm. Her only demonstrable injury was an economic injury. This finding is especially strong in light of the finding of both the District Court and the Ninth Circuit that the evidence supporting Rendish's claim on the merits was weak. While Rendish attempts to establish a split in authority, the better view is that the Third Circuit case of *San Filippo* is an aberrational case confined to the specific and unique fact pattern presented. As a result, there is little, if any, general national importance to warrant this court granting Certiorari. Rendish was unable to carry her burden of showing irreparable harm or success on the merits and was, therefore, denied her request for a Preliminary Injunction.

II.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THE SUPREME COURT AND DID NOT DECIDE SUCH A MATTER IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE SUPREME COURT.

The District Court, as affirmed by the Ninth Circuit, correctly decided the matter below. United States Supreme Court precedent was followed below and was not in conflict with relevant decisions of this Court, particularly the precedent set by *Connick v. Myers*, 461 U.S. 138 (1983); *Waters v. Churchill*, 511 U.S. 661 (1994); *Rankin v. McPherson*, 483 U.S. 378

(1987); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). This line of cases stands for the proposition that government, when acting as an employer, must be given greater deference when making employment decisions as distinguished from government acting as sovereign in dealing with matters involving an employee's claims that the employee's First Amendment rights were violated by the government employer. Accordingly, these cases hold, there must be within the analytical framework a mechanism established to allow a balancing of interests between the government's interest, as an employer, to deliver services in an efficient and effective manner versus the government employee's First Amendment rights in matters of "public concern". *See Connick v. Myers*, 461 U.S. at 142; *Pickering v. Bd. of Educ.*, 391 U.S. at 568. Rendish argues that the only restriction should be whether or not the lawsuit is frivolous. This is an insufficient safeguard and the District Court and Ninth Circuit Court of Appeals properly rejected this view. It is an inefficient use of judicial resources to review the instant matter which was correctly decided at both the District Court and Appellate levels.

III.

SEVERAL QUESTIONS RENDISH PRESENTS IN HER PETITION WERE NOT ADDRESSED BELOW AND THIS COURT SHOULD DECLINE TO ACCEPT SUCH QUESTIONS FOR REVIEW.

Several questions presented by Rendish's Petition were not addressed below. The Court should not accept these questions until the lower courts have had an opportunity to fully develop the issues involved, if at all. The following questions were not discussed or addressed below: whether curtailment of the right of access to courts . . . implicates not only a first amendment right but several other rights protected by the United States

Constitution and Bill of Rights; and, whether the issues broadly alleged in Petitioner's Complaint are issues of "extreme importance" or of "inherent public concern" to the extent that no distinction was made or hierarchy created regarding degrees of public concern.

The source of the right to access the courts, under present case law, arises under the First Amendment petition clause. *See McDonald v. Smith,* 472 U.S. 479, 482 (1985). The Ninth Circuit recognized this source. *Rendish v. City of Tacoma,* 123 F.3d at 1221. Rendish did not present as an issue on Appeal that the source of one's right to access the courts was from a source different from the first amendment, or that if the source of such right sprung from a different source, that a different analysis must follow. This Court should not accept for review, if at all, this issue as framed until the lower courts have had an opportunity to develop its analysis.

Beyond bare assertion, Rendish did not present as an issue on Appeal before the Ninth Circuit, the idea that there is a hierarchy of "public concern", or matters of "inherent public concern", and that if a pleading is characterized as falling into the category of higher public concern or inherent public concern, that no amount of disruption would justify termination under the *Pickering, Connick* balancing. This issue was not addressed by the Ninth Circuit or the District Court. Again, this Court should not accept this issue for review because it was not addressed below and because it necessarily involved an extensive factual analysis that has not occurred at the present stage of this litigation.

Other questions presented by Rendish should not be addressed by the Court because they are heavily dependent upon the particular facts of this case. Whether the trial court made the appropriate balancing under Ninth Circuit law to determine

whether Rendish suffered irreparable harm as a result of her termination, and was accordingly entitled to preliminary injunction, is an issue heavily fact laden and of interest only to the parties to this litigation. The District Court applied the appropriate legal framework in this regard and determined that Rendish had not carried her burdened of proving that there was either a strong likelihood of success on the merits and a possibility of irreparable injury or the existence of serious question on the merits and a balance of hardships tipping in her favor. *National Wildlife Federation v. Burlington Northern R.R., Inc.*, 23 F.3d 1508, 1510 (9th Cir. 1994). This finding was upheld on Appeal. *Rendish v. City of Tacoma, supra.* Rendish was unable to support her motion for a preliminary injunction with sufficient evidence entitling her to that relief (a preliminary injunction). The Ninth Circuit reviewed the district court's determination and agreed. Moreover, Rendish's entitlement to a preliminary injunction has little national importance justifying this Court's attention. Similarly, the District Court's determination of whether Rendish would prevail on the merits would turn on the heavily fact laden reasons for Rendish's termination and the facts which were presented to the District Court in conjunction with Rendish's Motion for Preliminary Injunction. These are not the types of issues this Court should review.

CONCLUSION

Rendish was not denied access to the courthouse. Rendish's ability to pursue her claims against Defendants has not been impaired by the Defendants. She has vigorously pursued her claims and appealed results with which she is dissatisfied. She has also failed to recognize that her conduct had disruptive consequences to the City Attorney's office. She fails to recognize the City Attorney's office has a responsibility to the citizens of the City of Tacoma to effectively and efficiently deliver services such as the effective prosecution of crimes occurring within the City. She fails to recognized that her conduct impaired the City's ability to accomplish this duty. She fails to understand that she does not have an absolute right to prosecute a suit no matter the consequences to her employer or the citizens her employer serves. The petition of Rendish should not be accepted by the Court.

Respectfully submitted,

JAMES W. FELTUS
Counsel of Record
McGAVICK GRAVES, P.S.
K. MICHAEL JENNINGS
Attorneys for Respondents
1102 Broadway, Suite 500
Tacoma, Washington 98401
(253) 838-2860